No. 84-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,

Petitioners

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE NATIONAL GOVERNORS' ASSOCIATION, AND THE AMERICAN PLANNING ASSOCIATION

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QUESTION PRESENTED

Whether, and in what circumstances, an exercise of government's power to regulate gives rise to a claim for compensation or damages.

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Pursuant to Rule 36 of the Rules of the Court, *amici* hereby seek leave to file the attached brief *amicus curiae* in support of the Williamson County Regional Planning Commission.*

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* Petitioner has consented to the filing of this brief. Respondent has not.

The *amici* are organizations whose members include state, city and county governments and officials located throughout the United States, and an organization comprised of city and regional planners and officials concerned with planning. Constitutional issues affecting the power of government to regulate and plan in the public interest are of vital importance to *amici* and their members. This case presents such an issue, since it involves the question whether, and in what circumstances, governmental bodies will be liable to pay compensation or damages to a party whose business or property is affected by an exercise of the police power. If the issue is decided adversely to petitioner, the costs of government at every level may vastly increase, and the ability of government to regulate in the public interest may be crippled. Such untoward consequences would arise not just in the field of land use planning, with which this case is immediately concerned, but in other areas of governmental regulation as well. For these reasons *amici* are deeply concerned over the outcome of this case, and are submitting this brief to assist the Court in its consideration of the matter.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

SUMMARY OF ARGUMENT

A. The critical question of this case is whether government is liable to pay compensation when, in the exercise of its power to protect the public interest, it alters regulations which previously governed a business or a commercial project.

An affirmative answer to this question is pregnant with debilitating consequences in a host of regulatory fields. Such an answer would expose government to financial liability of monumental, and literally incalculable, proportions. It would cause paralysis in the regulatory process. It would thwart the sequential, or staged, regulation and development which is necessary in numerous fields because of the complexities of modern technology. And it would cause courts to be swamped with lawsuits brought by businessmen claiming that their businesses or projects failed because of changes in regulation.

These adverse consequences should make this tribunal hesitant to adopt a rule of liability which, because it is constitutional, will be cast in stone for years to come. Moreover, this case is an inappropriate vehicle for establishing such a rule, which is sought by respondent. For not only are enough facts known to warrant reversal of the lower court's decision in respondent's favor, but additional facts relevant to the rule contended for by respondent do not appear to be in the record, and facts which *are* in the record often are murky at best.

B. Land use regulation occurs sequentially or in stages. Land developers play a highly influential role in this staged process. Also, both they and local governments receive extensive benefits from it. It is thus used in connection with virtually every development of any size in this country.

Under the staged process, both initial and subsequent approvals are required. This is reflected in the documents submitted by the developer at the different stages. Those documents become progressively more detailed or of different character. Thus, documents submitted at later stages may fail of approval though earlier documents gained approval.

Cluster planned developments go through the same staged process as standard developments. The only difference between the two types of developments lies in the manner in which they meet overall density requirements established by land use regulations. Clustered developments are allowed to meet these requirements by grouping or clustering houses on portions of the property, and are thereby enabled to obtain highly significant commercial advantages.

C. Well established legal principles govern question whether a change in regulations gives rise to a claim for compensation or damages.

For scores of years it has been established that governments at every level have broad power to regulate economic activities. They can do so without liability even though regulation diminishes the value of property. Otherwise government could not go on, authorities would have to regulate by purchase rather than by rule, and courts would be enmeshed in speculative predictions of profit allegedly lost due to regulation.

It is possible, however, that there could be egregious circumstances in which regulation gives rise to a compensable loss. But such exceptions must be carefully circumscribed lest debilitating consequences ensue. The exceptions should be confined to cases in which government is not acting in good faith pursuit of legitimate state interests. Also, in considering exceptions, three established principles must be taken into account:

First, in the absence of extraordinary delay, the passage of time during the process of governmental deci-

sionmaking does not give rise to a claim for compensation.

Second, for there to be a compensable loss due to regulation, an owner must be denied all viable economic use of his property. In determining whether there has been denial of such use, the property must be considered as a whole. Nor does mere loss of interest or rental value in itself constitute loss of viable economic use, since property may have extensive use and value despite such loss.

Third, the party claiming compensable loss must be able to show that its loss was in fact caused by a change in governmental regulations rather than by some other factor.

D. (1) The facts in this case show that, under governing principles, the decision below should be reversed:

(a) There was no bad faith pursuit of illegitimate objectives by any governmental agency or official in this case. Rather the jury specifically found that the defendants acted in good faith.

(b) Respondent is seeking damages for delay caused by regulation. The claim fails because the local government agencies acted promptly and with no extraordinary delay. Indeed the regulatory process was much shorter than it permissibly could have been, since respondent chose not to seek a variance, which would have extended the process, and instead filed a lawsuit. Most of the delay was incurred during respondent's suit.

(c) The truly insurmountable obstacles faced by respondent appear to have been density and slope requirements which existed in 1973 and were not subsequently changed. Since these requirements remained unaltered, respondent cannot validly claim it suffered loss because of a change in regulations.

(d) Approval of the initial sketch plat in 1973 did not create a right to build a total of 736 houses, as claimed by respondent. The 1973 plat lacked essential information which only became available in connection with later plats and which caused them to be properly disapproved. Further, the initial plat specifically stated that substantial portions of the land were not to be developed until approved by the planning commission. Finally, basic assumptions of the initial sketch plat were not fulfilled by the developer.

(2) If the decision below is not reversed outright, then the case should be remanded for development of absent facts which are highly pertinent to the question whether regulation can give rise to a compensable taking.

(a) For all that appears in the record, the project as a whole may realize a significant profit. If so, there can be no denial of viable economic use and no compensable taking.

Respondent, however, wishes to divide the project into segments and to recover the interest lost on one of those segments. However, it is established law that the project must be viewed in its entirety, not in sections. Further, lost interest does not constitute a denial of viable economic use, since the property may have extensive use and value despite such loss.

(b) Even if the project as a whole will suffer an overall loss, the record does not show that governmental regulation is the cause of the loss. Nor can such causation merely be assumed. This is only the more true because facts subject to judicial notice show the loss could easily have been caused by serious declines in the housing market in the Nashville area, declines paralleling those which occurred elsewhere in the nation.

ARGUMENT

I. Introduction

The instant case involves a land use controversy arising in a suburban area of Nashville, Tennessee. In this controversy it is claimed that delay in the development of a parcel of land, when caused by new regulations, gives rise to a compensable taking under the Fifth Amendment.

But though the case comes clothed as only a land use matter, it actually is of far broader and more crucial importance to government at every level. For the critical question of the case is whether government is liable in damages when, in the exercise of its power to protect the public welfare, it alters regulations which previously have governed a business or a commercial project. Such regulatory changes, made to protect the public interest, and often based on new or fuller information, are a commonplace of governmental and commercial life. They occur daily in every area from land use planning, to the construction of nuclear power plants, to the sale and distribution of ethical drugs. They occur regularly in fields in which private entities had to secure previous approvals under prior rules. If the regulatory changes give rise to a right of compensation because private entities expected that prior rules would remain in place, and may have made investments based on such expectations, then the dollar amount of liability to which governments at every level will be subject is quite literally incalculable. It probably is conservative to estimate it as being tens of billions of dollars per year.

Not only is the potential financial liability of monumental proportions, but the effect on the governmental process could be paralyzing. For to avoid the potentially large liability flowing from changes in rules and regulations, government would have to refrain from making changes which new information and ideas show to be

necessary for the public welfare. Or, sometimes even worse, government might avoid granting *initial* permission for projects lest it thereby be precluded from making later changes which experience and information show to be necessary. A lack of initial permissions would be as undesirable for businessmen as for government, since businessmen will be reluctant to proceed with projects in the absence of the initial approvals.[1]

The portentous consequences at stake here are the more debilitating because the complexities of modern life and technology make it essential for large projects to be developed, and to be subjected to regulation, in stages. Large land developments—just like large nuclear plants or modern bombers—are not fully planned and approved in one fell swoop. Rather, within the context of overall goals, development and approvals occur in stages. If governing regulations cannot be altered to reflect enhanced information and changed facts, then the process of *staged* development and approval will be thwarted—a process made inherently necessary by modern conditions will be stymied.

Nor do the foregoing consequences exhaust the list of undesirable probabilities. Another likelihood is that, whenever commercial projects fail, as occurs uncounted times daily, businessmen seeking to recoup their losses will file lawsuits claiming the failures are due to compensable changes in governmental rules and regulations. The courts will thus be swamped with litigation involving complex economic questions of the origins and causes of business failures.

Thus this case is pregnant with adverse consequences. Those consequences are not confined to the field of land use planning—where they will of course be felt very heavily—but extend to a wide variety of other activities

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[1] Sallet, Jonathan B., *The Problem of Municipal Liability for Zoning and Land Use Regulation*, 31 Cath.U.L.Rev. 465 (1982).

as well. The consequences should give a tribunal pause before laying down a rule of liability which, because it is constitutional, will be cast in stone for years to come.

Nor is this case an appropriate vehicle for laying down the rule of liability contended for by respondent. For, though *amici* believe enough facts are known to warrant an outright reversal, they are frank to say that several relevant facts do not appear to be in the record, and the facts which *are* in the record often are murky at best. Thus, if the case is not appropriate for reversal, it should be remanded for development of the facts pertinent to the question whether, and under what circumstances, a change in governmental regulations gives rise to a compensable taking.

II. Land Use Regulation and Development Is a Process Which Occurs in Stages, and Land Use Projects Must Receive Both Initial and Subsequent Approvals

A. We begin our discussion by describing pertinent features of land use regulation and development.

Land use regulation has been adopted by nearly every city, county and state in the country in order to provide for rational growth and development.[2] Recognizing the crucial need for this regulation, the Court has repeatedly approved it. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court, indeed, has pointed out that great deference must be shown to the decisions of local authorities engaged in land use planning. *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 388; *see Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

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[2] 8 McQuillin, The Law of Municipal Corporations § 25.04 (3rd ed. 1976).

The process of regulating and planning the use of land, and developing the land, is rarely one which occurs in a brief moment of time. Rather, the process is an ongoing one which occurs sequentially, or in stages. This is as true for individual projects such as large residential subdivisions as it is for whole new areas of cities and counties.

Staged planning and development is necessary because it is not possible to know all the relevant facts and details at the beginning. At the inception of a residential project, for example, unavailable information can and sometimes must include facts concerning the exact topography of portions of the land, the exact location of streets and houses, whether necessary dedications of open spaces, streets and public buildings such as schools will have been made, whether requirements such as inclusion of low or moderate income housing will have been met, whether sewage systems, water systems and houses will meet the engineering and safety standards of local codes, and the precise size, style and price of houses whose sale will be supported by market conditions existing when building actually occurs.

But though a host of relevant facts are not known at the inception, there nevertheless must *be* an inception if regulatory planning and commercial development are to proceed. For this reason, local land use laws provide for initial approvals of highly generalized plans for development. And, because protection of the public welfare requires continuing governmental oversight as plans and projects become more specific and concrete, the land use laws provide for subsequent approvals as a developer's plans become more detailed and approach closer to reality.

This staged process is one in which the developer plays a highly influential role, and from which both he and the local government benefit. The developer's role

is very influential because, in his presentations and arguments to local government officials, he explains his plans, his needs, the tax, developmental and other benefits to be derived from the project by the local government, the pros and cons of differing approaches to specific developmental problems, and other pertinent matters.

The developer benefits from the process because initial approval of generalized plans informs him that the local government will permit or welcome a project from which he hopes to make large profits, and because the later approvals permit him to actually construct and sell houses or other buildings. The local government benefits because the requirement of initial approval enables it to know of and rationally control development within its jurisdiction, while the requirement of later approvals enables it to protect the public welfare by ensuring that appropriate standards are met. Being of great benefit to both sides, the staged process is used in virtually every development of any size in this country.[3]

The differences between the initial generalized approval and more specific later approvals is reflected in the documents which the developer submits at the different stages. In general, there can be from two to five formally submitted documents, variously called by such names as the conceptual or initial sketch plan, the preliminary plat, and the final plat.[4] The information given on these documents becomes progressively more detailed or of different character. Thus while the initial sketch plan gives only a generalized conceptual idea of the project, the preliminary plat contains sufficient construc-

[3] International City Management Association and American Planning Association, *The Practice of Local Government Planning* (1979).

[4] International City Management Association and American Planning Association, *The Practice of Local Government Planning*, (1979); Meshenberg, M., *The Language of Zoning*, ASPO Report No. 322 (1976).

tion and engineering data so that the project can be reviewed for compliance with land use regulations and the precise location of roads, buildings and utilities can be ascertained. From the preliminary plat, but not from preceding documents, one can ascertain the precise location, width, slope and curves of streets, the precise boundaries, size and configuration of lots, the exact setback lines on lots, the slope of lots, the location of connections for water, sewer and utility lines, the height of curbs, and other pertinent information. In some jurisdictions the preliminary plat is also accompanied by certificates of compliance with water, sewer, subdivision and zoning regulations; such certificates are issued by the appropriate local officials such as city or county health officers and engineers. (In other jurisdictions these certificates accompany the final plat.)

The final plat is a document which enters the chain of title. It sets forth such information from the preliminary plat as is necessary for title purposes, plus additional title information such as the legal boundaries of all lots owned in fee and of all easements created for the project. In most states it also serves to convey or dedicate areas for public use.[5]

Because the documents submitted by a developer become progressively more detailed or of different character, and later documents provide previously unavailable information enabling a local government to know whether its land use regulations are in fact being met, the later documents may fail to gain approval though the earlier ones have passed muster.[6]

[5] In some areas information accompanying the final plat also enables authorities to know whether appropriate portions of the project have been set aside for low and moderate income housing and housing for the elderly.

[6] A sequential or staged process similar to the one described in the text exists for major commercial or residential structures which

B. Cluster planned developments, such as the one contemplated in this case, involve the same staged process of approval and development as other residential housing projects. Thus, the only difference between a cluster planned development and a more standard development lies in the way in which the density requirements of a zoning law are met. For instance, when the overall density requirement limits the development to only one house per acre, a standard residential development will meet the law by placing every house on a separate acre of land. In cluster planning, however, the density requirement may be met by placing three houses on one acre, while leaving two acres as open space, parkland or forest.

By permitting a developer to meet density requirements by clustering houses, a zoning law gives him several advantages. Because of their large amounts of parkland and forest, cluster planned developments are often regarded as highly desirable, and houses in such developments may sell at a premium. Also, because large amounts of space are left free of residential construction, the developer may be able to save money by putting in shorter roads, sewer lines, water lines and electricity lines.

Finally, the developer benefits because he can take advantage of land which might be useless in a regular development. For example, if a portion of his property has slope or other problems which prevent houses from being built on it, in a standard project the developer might have to build, say, twenty less homes. But in a cluster planned development the "unbuildable" land can be used as open space and the twenty houses can be put on different portions of the property. In this way, the builder obtains great benefit from "unbuildable" land

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do not require subdivisions. Usually referred to as "site plans", documents submitted under this procedure are used for shopping centers, office buildings and apartment buildings.

which would be useless in a standard development. That land thus has economic value in a clustered development that would be wholly lacking in a standard one.

III. Well Established Legal Principles Govern the Question Whether a Change in Regulations Creates a Right to Compensation or Damages

A. We turn now to a discussion of legal principles governing the issue whether a change in regulations gives rise to a claim for compensation or damages.

For scores of years it has been a truism that, to protect the public welfare, government at every level has broad power to regulate economic activity. *Hawaii Housing Authority v. Midkiff*, —— U.S. ——, 104 S.Ct. 2321 (1984); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Williamson v. Lee Optical Co. of Oklahoma*, 348 U.S. 483 (1955); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Economic regulations are therefore upheld if supportable on any reasonable basis. *Andrus v. Allard, supra*, 444 U.S. at 59; *Ferguson v. Skrupa, supra*, 372 U.S. at 729; *Williamson v. Lee Optical Co. of Oklahoma, supra*, 348 U.S. at 488; *Euclid v. Ambler Realty Co., supra*, 272 U.S. at 387.

Thus, in the field of land use planning, and in countless other areas as well, public interest regulation altering the status quo has been upheld though it greatly diminished or destroyed the value of businesses or projects whose success depended on continuation of that status quo. See *e.g.*, *Euclid v. Ambler Realty Co., supra*, (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87½% diminution in value); see also, *Andrus v. Allard, supra* (total prohibition of sale of bird parts lawfully obtained prior to the effective date of the statute); *Everard's Breweries v. Day*, 265 U.S.

545 (1924) (prohibition against the sale of liquors manufactured before passage of the statute). Such police power regulation has not been regarded as a compensable taking of property or as a violation of due process giving rise to a claim for damages.

The reasons why economic regulation under the police power does not give rise to claims for compensation are clear. At least since the time of Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and as recently as the dissenting opinion of Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 at 650 (1981), the Court has explicitly recognized the general proposition that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. *See* also, *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 124.

Furthermore, if regulation gave rise to a right of compensation for diminution in value, government would often be compelled to regulate by purchase, rather than by rule, though it has neither the desire nor the funds for purchase. The matter was recently discussed in *Andrus v. Allard*:

> Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances *would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."* *Andrus v. Allard*, *supra*, 444 U.S. at 65 (emphasis added).

Finally, courts have been reluctant to predict the future profits whose loss due to regulation causes diminu-

tion in the value of property. As the Court said in *Andrus v. Allard*, *supra*, 444 U.S. at 66, "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

Thus this Court has rejected as "quite simply untenable" the notion that parties can obtain a right to compensation by showing that a "substantial restriction" has been imposed which "denie[s] the ability to exploit a property interest that they heretofore had believed was available for development . . ." *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 128-129, 130. In the field of land use planning the Court has permitted precisely such restrictions because, in the judgment of local officials, they protect against ill effects arising from urbanization, enhance the quality of life in a municipality and the aesthetic character of the municipality, prevent the unnecessary conversion of open space land, and offer reciprocal benefits to all who are affected by them.[7] *Agins v. City of Tiburon*, 447 U.S. 255

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[7] In a salient passage from *Suess Builders Co. v. Beaverton*, 294 Or. 254, 656 P.2d 306, 309 (1982), Justice Hans Linde of the Oregon Supreme Court pointed out that an exercise of the police power, including a regulation affecting land, does not give rise to a right of compensation. Rather, "Business invests with knowledge of such governmental power to make laws for its conduct. . . ." Justice Linde said:

> A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomic to maintain a hotel or residential building, with consequent financial loss. Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation

(1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

B. Though as a general rule exercises of government's regulatory power do not create claims for compensation, *amici* recognize the possibility that there could be egregious circumstances in which such claims might arise.[8] However, such exceptions to the general rule must be carefully circumscribed lest they cause the serious adverse consequences described earlier in this brief; *i.e.*, lest they create monumental liability for government at all levels, paralyze government's ability to make regulatory changes for the public welfare,[9] vitiate the process of staged regulation and development, swamp the courts with lawsuits by businessmen seeking to recoup real or

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for "just compensation." See *Anthony v. Veatch*, 189 Or. 462, 494, 220 P.2d 493 (1950) (prohibition of "fixed gear" fishing); *City of Portland v. Meyer*, 32 Or. 371, 52 P. 21 (1898) (prohibition of slaughter house). Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land. (Footnotes omitted).

[8] Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego, supra*, seems to be premised in significant part on rejection of the idea that regulation can never give rise to a taking. Thus after stating the question of the case, Justice Brennan said "Implicit in this question is the corollary issue whether a government entity's exercise of its regulatory police power can *ever* effect a 'taking' within the meaning of the Just Compensation Clause.' 450 U.S. at 646-647 (emphasis added). Justice Brennan further pointed out that "the California courts have held that a city's exercise of its police power, *however arbitrary or excessive*, cannot . . . constitute a 'taking' ". *Id.* at 647 (emphasis added). Finally, he also said the Court has "rejected the proposition that police power restrictions could *never* be recognized as a Fifth Amendment taking." *Id.* at 650 (emphasis added).

[9] A major recent example of such changes is the enactment of laws and regulations designed to eradicate discrimination by race, religion, sex or age.

alleged losses, force government to regulate by purchase rather than by rule, and enmesh the courts wholesale in speculative predictions of profitability.[10] Thus, the cases in which there could be an exception to the general rule must be confined to ones in which government is not acting in good faith pursuit of legitimate state interests, but is instead taking bad faith actions designed to harm a party. See *Agins v. City of Tiburon, supra*, 447 U.S. at 260 (a taking may arise if an "ordinance does not substantially advance legitimate state interests"), 263 n.9 ("The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking.")

Moreover, entirely aside from whether there can be a taking in the absence of bad faith, in determining whether regulatory action gives rise to a claim for compensation, it is also necessary to consider basic jurisprudential principles which are central to whether a party can assert a valid claim. Three such principles are preeminent.

First, absent extraordinary delay, the passage of time during the process of governmental decisionmaking cannot give rise to a claim for compensation. Governmental decisionmaking is the essence of regulation, and it necessarily requires sufficient time to proceed. Even if property declines in value while decisionmaking is in progress, absent extraordinary delay this will not create a taking, or a claim for damages, lest the power of regulation be thwarted. That no claim arises from a decline in value during the decisionmaking process has been made explicit in *Agins v. City of Tiburon, supra*, 447 U.S. at 263 n.9:

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[10] Freilich, Robert H., *Solving the 'Taking' Equation: Making the Whole Equal the Sum of Its Parts*, 15 URBAN LAWYER 417, 552-553 (1983).

> Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

Second, for there to be a compensable taking, a regulation must "den[y] an owner economically viable use of his land . . ." *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 295-96 (1981), quoting *Agins v. City of Tiburon, supra*, 447 U.S. at 260. As indicated earlier, a taking does not arise simply because the value of property is lessened, and public interest regulations greatly diminishing the value of property have been upheld. Not mere lessening of value, but preclusion of all viable economic worth, is the sine qua non of compensability.

It is therefore clear that there can be no compensable taking if property has *increased* in value during a period of governmental decisionmaking. As well, a loss of interest or rental value during this period cannot in itself constitute a taking. Such loss merely lessens, but does not preclude, economic value, and it may indeed be offset by a rise in value due to changed market conditions.

Moreover, in determining whether there has been a total loss of value, it is necessary to consider a parcel or project as a whole. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 130. Were the rule otherwise, a party with a large overall profit could secure compensation because a small portion of his project lost value due to regulation furthering the public welfare.

Third, a party claiming compensable loss must be able to show, under normal rules of causation, that his loss

arose because of governmental regulation. If the loss is attributable to other causes, the government cannot be made to pay. Otherwise the government will become an insurer, or guarantor, of profit. That would clearly be impermissible.

IV. Under Governing Legal Principles, the Decision Below Must Be Reversed, or the Case Must Be Remanded for Development of Additional Pertinent Facts

We turn now to an assessment of whether, under governing legal principles, the facts of this case give rise to a claim for compensation or damages. As indicated above, *amici* believe enough facts are known to require reversal. But they would candidly say that, because a number of relevant facts seem to be either absent or murky, the Court might desire to remand for development of a fuller record before determining the crucial constitutional issue at stake here.

We first discuss facts and reasons warranting outright reversal of the lower court's ruling that there was a compensable taking:

A. To begin with, a claim of compensable taking appears unfounded because there seems to be no bad faith pursuit of illegitimate objectives by any governmental agency or official. Indeed, as the trial court said, the jury found that "the members of the Planning Commission and other named defendants had acted reasonably and in good faith." Memorandum Opinion of Judge John T. Nixon, D.C.M.D. Tenn., reprinted in Appendix to Petition for Writ of Certiorari, at 24a.

In this connection, changes in the zoning laws and regulations in 1977 and 1979 appear to have been reasonable and appropriate exercises of the power to regulate land use. Such changes (1) required that when calculating the number of houses allowable on the total acreage, ten percent of the acreage must be subtracted as attribu-

table to roads and utilities; (2) required that an acre be calculated as 43,560 square feet—a true acre—instead of 40,000 square feet; (3) increased minimum lot sizes from 9,000 square feet to half an acre; and (4) increased minimum lot widths from 75 feet to 125 feet. All such changes are clearly within the regulatory power.

Respondent did claim below, however, that the reason it was unable to build all the houses it wished was that a new county executive took office, with a different view toward the desirability of intensive development. However, even if the new executive had a less favorable view of development, such an attitude is not illegitimate or a sign of bad faith—and the jury found no bad faith. Opposition to intensive growth is a wholly permissible position for governmental officials to hold and is perfectly appropriate for implementation through the police power. Moreover, as nearly as *amici* can determine from the record, respondent's desire to build more units was blocked, not by governmental attitudes, but by respondent's failure to meet permissible criteria such as density and slope requirements.

B. Another reason why there is no compensable taking is that respondent seeks remuneration for delay occurring because plats it submitted in 1980 and 1981 failed of approval. However, as made clear in *Agins v. City of Tiburon*, *supra*, unless it is extraordinary, delay incident to the regulatory process creates no claim for compensation. Rather, such passage of time is an inevitable incident of the ownership of property, since the regulatory process requires time to proceed.

In this case, the local planning commission appears to have acted promptly, and there is no suggestion of extraordinary delay. This in itself defeats respondent's claim for compensation.

Moreover, not only was the regulatory process prompt, but it actually was far shorter than it permissibly could

have been. For respondent chose not to exercise its right to seek an administrative variance, which would have lengthened the regulatory process, and instead filed a lawsuit. Most of the delay of which respondent complains occurred during the period of the suit, and is therefore attributable not to slothful regulators but to respondent's own decision.[11]

C. Another reason that a claim of taking appears unfounded is that there was no change in the density and slope requirements which appear to have been the real barriers to respondent's desire to build more houses. The density requirement of no more than one house per acre existed in 1973 and remained in place, and the same is true of the requirement that no house be built on a lot having a slope greater than twenty-five percent. Because these requirements, which seem to have been the truly insurmountable obstacles confronting respondent, had undergone no alteration over the years, respondent cannot validly claim a taking arose from regulatory changes.[12]

D. Respondent claims a right to build a total of 736 houses because the sketch plat initially submitted by the developer, which was approved in 1973 and reapproved

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[11] Respondent's failure to exhaust its administrative remedies by seeking a variance is another reason why it has no claim for compensation. An attempt to secure a variance could have enabled respondent to obtain prompt approval for its plats and thereby obviated the delay of which it complains. (We note that, when respondent sought a variance in 1983, one was expeditiously approved.) Moreover, absent extraordinary delay, there can be no compensable taking until the regulatory process has made a decision with finality. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). There was no such decision in the absence of an attempt to receive, and a rejection of, a variance.

[12] The failure to meet the density requirement was not due to the change in the definition of an acre, which was expanded from 40,000 feet to 43,560 feet.

afterwards, stated that this was the allowable number of dwelling units. But as discussed earlier, the land use planning process occurs in stages. An initial sketch plat is far less detailed than later plats, and each plat must receive separate approval. A later plat may fail of approval, though the earlier one gained it, because the added information on the later plat shows that the developer's initial plans cannot be carried out in conformity with the law.

That indeed appears to have been the case here. The initial sketch plat which was approved and reapproved lacked information on the topography of the land. When such information became available in connection with later plats, it showed that the desired number of houses could not be built without extensive violations of the county's slope requirements. The later plats were therefore properly disapproved.

E. Not only were the later plats properly disapproved, but the initial sketch plat itself carried notations showing that substantial portions of the land were not to be developed until approved by the planning commission. For this reason, too, respondent cannot validly assert that approval of the initial sketch plat created a right to build a total of 736 houses, the total which would have been reached under respondent's later plats.[13]

F. Though respondent relies on the initial sketch plat as creating a right to build 736 houses, the assumptions of that plat were not fulfilled. Thus 18½ acres of land, which could have been used for numerous dwellings, were instead taken by the state for use as a highway.

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[13] We note that, though respondent relies on the initial 1973 approval, Williamson County subdivision regulations in effect in 1973 specifically stated that "approval of the preliminary plat by the planning commission will not constitute acceptance of the final plat. . . ." Williamson County, Tenn. Subdivision Regulations, 1959; Article II § B4, at A-872.

Similarly, a 245-acre golf course that was supposed to be devoted to residents of the project became a country club to which residents did not necessarily belong. The change in the golf course constituted a failure to provide one of the promised benefits which had caused the planning commission to allow the developer the advantages of a cluster planned development.

Amici now discuss reasons indicating the case should be remanded because of pertinent but absent facts:

A. As indicated earlier, because there can be no compensable taking unless an owner has been denied all economically viable use of his land, no right to compensation or damages will arise if a project has made a profit. In the present case, however, it is unknown whether the project has or will make a profit. Indeed, the record apparently does not even show the precise amount of investment in the project, let alone the profit or loss on it.

In this regard, the only known facts are that 212 houses and the 245 acre golf course have been built and sold, county officials state that another 300 houses can be built on the remainder of the property without violating land use regulations, 18½ acres were sold to the state, the developer went through bankruptcy, and, though it does not seem to be in the record, the respondent bank apparently has received approval for a new plat and has already sold a part of the remainder of the property to a new developer.

Under these facts, it is perfectly possible that the project as a whole may show a profit when all the houses are built and sold. Indeed, it is also possible that the respondent bank *itself* may make a profit because of sales of the remainder of the property.

Because the project as a whole may prove profitable, it cannot presently be said that there has been a compensable loss. Moreover, even if it could be established

that there will be an overall loss, the respondent bank would not be the proper party to receive compensation for that loss if it will itself make a profit. Nor would it be a proper party to receive compensation for the entire loss if it will suffer only part of the loss.

In the courts below, however, respondent claimed that it should obtain compensation for loss on the remainder of the land, divorced from the project as a whole, and that such compensation is measured by the interest respondent failed to earn because of delay in the project. These claims are erroneous.

As the Court has made clear, a project cannot be carved into separate segments in determining whether there has been a compensable taking due to alleged denial of economic use.[14] Rather the project must be looked at in its entirety, lest compensation for loss erroneously be awarded where there is extensive economic use and a profit.[15] This principle is especially applicable to cluster planned developments, where portions of land on which construction is not permitted due to slope or other problems are nevertheless integral to the project because, by remaining as open space, they allow an increased number of dwellings to be built on other portions of the land.

Thus, even assuming the unknown fact of loss on the remainder of the land, there can be no taking here, and no compensation, if the project as a whole is profitable.

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[14] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978).

[15] Though our discussion has focused in large part on the question of profit or loss, we do not mean to imply that there can be no viable economic use in the absence of profit. The question of viable economic use is a complex one which must take account of cash flow benefits, tax deductions and credits, and other economic and financial factors that are commonly considered when assessing the worth of businesses or investments.

Nor can compensation be measured here by alleged loss of interest due to delay, as claimed by respondent. This claimed loss did not deprive respondent of all viable economic use of its property, and, for all that appears, respondent may make a significant profit because of sales of the remainder of the land. The most that could flow from the loss of interest is a reduction in the property's value to respondent. But a mere reduction in value is not a compensable taking, as this Court has often made clear.[16]

B. Even if it is assumed that there will be an overall loss on the project, or that loss on the remaining portion of the land can be considered apart from the overall financial results, the record does not appear to demonstrate that these losses were caused by actions of the local government. Nor can such causation be assumed. Unproven assumption of causation is normally inappropriate in any litigation, and is further belied here by economic facts of which the Court may take judicial notice.

Housing starts declined precipitously in the Nashville area during the two years following the initial 1973 approval of the first sketch plat in this case: housing starts in the area went from 8,634 in 1973 to only 3,187 in 1975.[17] Then, after rising to nearly 8,000 in 1977 and 1978, they again declined precipitously to only 3,163 in 1981. The housing market in the Nashville area thus

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[16] *Andrus v. Allard*, 444 U.S. 51 (1979).

[17] The source of the information set forth in this brief on housing starts in the Nashville area and in the country as a whole is U.S. Bureau of the Census, *Construction Reports—Housing Units Authorized by Building Permits and Public Contracts: Annual 1973-1983*. (The Nashville SMSA was enlarged in 1978, so numbers for subsequent years were increased by approximately 23 percent. Thus the figure of 3,163 housing starts in 1981 is higher than it would have been under methods of calculation in use in 1978 and earlier.)

paralleled the housing market nationally, which went from a total of 2,045,000 housing starts in 1973 to only 1,160,000 in 1975, and which, after rebounding to approximately two million in 1977 and 1978, again dropped precipitously to only 1,084,000 in 1981 and 1,062,000 in 1982.[18] Furthermore, the housing market appears to have been dramatically affected by changes in the interest rates. Compare U.S. Bureau of Census, *Statistical Abstract of the United States, supra,* Table No. 1328, New Housing Units Started: 1960 to 1983, with U.S. Bureau of the Census, *Statistical Abstract of the United States, supra,* Table No. 870, Bond Yields, Stock Yields, and Mortgage Rates: 1970 to 1982.

Thus, it would appear reasonable to believe that the cause of any overall loss suffered by this project may have been economic conditions affecting the Nashville housing market, conditions which made it difficult to sell homes and thereby forced developers to bear high carrying costs for a long period of time. Furthermore, had economic conditions not been adverse for long periods, the entire project might have been completed well before the 1980's delay for which respondent seeks compensation because of an alleged loss relating to an unfinished portion of the project. Since it seems entirely possible that economic conditions rather than government regulation was the cause of loss, to award compensation for a claimed taking would make government an insurer of profit—a result which is impermissible. Thus, unless and until it is proven that governmental regulation *was* the cause of claimed losses, it is erroneous to award compensation for them.

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[18] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1984,* Table No. 1328 (104th ed.), Washington, D.C., 1983.

CONCLUSION

For the foregoing reasons, the Court should either reverse the decision below or remand for the development of a fuller record containing pertinent facts which presently are unknown.

Respectfully submitted,

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